**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

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| SAMUEL K. LIPARI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil No. 07-0849-CV-W-FJG |
| | ) | |
| GENERAL ELECTRIC COMPANY, *et al*., | ) | |
| | ) | |
| Defendants. | ) | |

# REPLY TO PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO INTERVENTION

On April 25, 2008, the undersigned Assistant United States Attorney filed a MOTION TO SET AN ANSWER DATE [Doc. 44], entering an appearance on behalf of defendant Bradley J. Schlozman ("Schlozman") and asking the Court to set an answer date for Schlozman because the plaintiff Samuel K. Lipari ("Lipari") had not completed service of process pursuant to FED. R. CIV. P. 4(i)(1)(A)(i), (3), so as to trigger an answer date for Schlozman under FED. R. CIV. P. 12(a)(3). On April 30, 2008, Lipari filed his SUGGESTIONS IN OPPOSITION TO INTERVENTION OF U.S. ATTORNEY GENERAL MICHAEL B. MUKASEY AS COUNSEL FOR BRADLEY J. SCHLOZMAN ("OPPOSITION TO INTERVENTION") [Doc. 47].

In his OPPOSITION TO INTERVENTION, Lipari argues that the "US Attorney General does not have a right to intervene under Rule 24." OPPOSITION TO INTERVENTION, at 4. However, at this time, the United States is not seeking to intervene in this litigation under FED. R. CIV. P. 24. The Department of Justice is merely providing Schlozman with legal representation in this civil matter. To that end, Lipari's OPPOSITION TO INTERVENTION may be more properly read as a motion to disqualify the Department of Justice from providing such legal representation to Schlozman. In that regard, Lipari's request should be denied by the Court.

In support of his OPPOSITION TO INTERVENTION, Lipari primarily argues that Schlozman was a private citizen at the time this litigation was instituted, having resigned from the Department of Justice. OPPOSITION TO INTERVENTION, at 1-2.[1] The argument asserted by Lipari is immaterial to the ability of the Department of Justice to provide legal representation to Schlozman in this civil matter.

It is certainly true that the federal government is not compelled to provide representation to employees (or former employees) sued in relation to acts which were undertaken within the scope of their employment. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst.*, 566 F.2d 289, 292 n.7 (D.C. Cir. 1977); *Ryan v. United States*, 227 Ct. Cl. 711 (Ct. Cl. 1981) ("Although the Government has long recognized the importance of providing its employees with legal representation and often defends its officers who are sued or prosecuted for executing its laws, the law does not compel the Justice Department to defend these employees."). However, it is equally true that the federal government is authorized to provide such representation when it is determined to be in the interest of the United States. To that end, courts have consistently rejected arguments seeking to disqualify the Department of Justice from representing a present or former government employee. *See*, *e.g.*, *Christensen v. Ward*, 916 F.2d 1462, 1484 (10th Cir.1990); *Meiners v. Moriarity*, 563 F.2d 343, 350 (7th Cir. 1977); *Meredith v. VanOosterhout*, 286 F.2d 216, 219-20 (8th Cir. 1960); *Booth v. Fletcher*, 101 F.2d 676 (D.C. Cir. 1938).

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[1] Lipari also claims that he is charging Schlozman with unlawful conduct occurring after Schlozman left the Department of Justice. Lipari's only support for this accusation is the fact that he has plead an ongoing conspiracy. As to the specific, tangible acts alleged to have been undertaken by Schlozman [*see*, *e.g.*, AMENDED COMPLAINT ¶¶ 35, 100, 132-33, 289-305, 333], all occurred while he was employed with the Department of Justice. As such, the Attorney General was well within his discretion in determining that representing Schlozman in this civil matter was in the best interests of the United States.

By virtue of federal law, authority is vested in the Attorney General to "attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.[2] With regard to this statutory enactment, the United States has maintained that its interest in representing its current and/or former employees is twofold:

> [F]irst, since the conduct at issue was performed in connection with federal employment, it may be important from a governmental standpoint to establish its legality; secondly, the failure of the Government to undertake the expense of defending apparently lawful actions in the performance of governmental duties could have a detrimental effect upon the proper and vigorous performance of assignments in the future.

*Ryan*, 227 Ct. Cl. at 711 (*citing* Senate Comm. on the Judiciary, Subcomm. on Administrative Practice and Procedure [Staff Report on Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Law Suits], 95th Cong., 2d Sess. (Comm. Print 1978)). Consequently, "[f]ederal employees are . . . provided with legal counsel in order to protect the interests of the Government, not the individual interests of the employee." *Id.* Accordingly, the fact that Schlozman is now a former government employee does not diminish the applicability of 28 U.S.C. § 517. *Hall v. Clinton*, 285 F.3d 74, (D.C. Cir. 2002) ("the statute . . . permit[s] representation of private individuals as long as a government interest is at stake [*emphasis in original*]"); *Brawer v. Horowitz*, 535 F.2d 830, 834 (3d Cir. 1976) (same).

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[2] The procedures for requesting representation are set forth in 28 C.F.R. § 50.15. A "federal employee" is defined therein "to include present and former Federal officials and employees." 28 C.F.R. § 50.15(a).

A party seeking to disqualify opposing counsel bears the burden of clearly showing that continued representation would be impermissible. *A.J. by L.B. v. Kierst*, 56 F.3d 849, 859 (8th Cir. 1995). In this regard, federal courts subject motions to disqualify counsel "to particularly strict scrutiny." *Droste v. Julien*, 477 F.3d 1030, 1035 (8th Cir. 2007). *See also Griffen by Freeland v. East Prairie Missouri Reorganized School District*, 845 F.Supp. 1251, 1253 (E.D. Mo. 1996) (a "party seeking disqualification carries a 'heavy burden'"). Put alternatively:

> A party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary.

*Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Lipari's arguments fail to satisfy the stringent requirements necessitating a removal of counsel. As bluntly noted by the Eighth Circuit:

> [T]here can be no question about the right of the United States through its Attorney General and other subordinate officers to appear for and conduct the defense of any of its officials who have been proceeded against by reason of their official acts.

*Meredith*, 286 F.2d at 219-20 (*emphasis added*).[3]

For the foregoing reasons, defendant Bradley J. Schlozman respectfully requests that the Court deny Lipari's implicit motion to disqualify the Department of Justice from representing Schlozman in this matter and, further, that the Court grant Schlozman's original motion and enter an order setting a deadline of Tuesday, June 24, 2008, for Schlozman to file an answer or other responsive pleading to the AMENDED COMPLAINT.

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[3] *See also Brawer v. Horowitz*, 535 F.2d 830, 834 (3rd Cir.1976) (concluding that it "approaches the frivolous" to argue that "the Department of Justice possesses no statutory or regulatory authority [under section 517] to represent a nongovernment defendant in a civil case").

Respectfully submitted,

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By /s/ *Jeffrey P. Ray*

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ATTORNEYS FOR DEFENDANT BRADLEY J. SCHLOZMAN

[4] Authorized by the Department of Justice, on March 24, 2008, to provide individual capacity representation to Bradley J. Schlozman, former Interim United States Attorney, Western District of Missouri, in the case of *Samuel Lipari v. General Electric Co., et al.*, 07-0849-CV-W-FJG (W.D. Mo.). 28 C.F.R. § 50.15(a)(2).

# CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that on this 30th day of April, 2008, a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO INTERVENTION** was electronically filed with the Clerk of the Court using the CM/ECF system, which then sent electronic notification of such filing to:

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The undersigned Assistant United States Attorney further certifies that on this 30th day of April, 2008, a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO INTERVENTION** was placed in the United States first class mail, postage prepaid, addressed to the following non-ECF participant:

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*PRO SE* PLAINTIFF

*/s/ Jeffrey P. Ray*
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